



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 30, 2015

Charles R. Spies, Esq.
Clark Hill PLC
1250 Eye Street, N.W.
Washington, D.C. 20004

RE: MUR 6535
Restore Our Future, Inc.

Dear Mr. Spies:

On February 29, 2012, the Federal Election Commission (the "Commission") notified Restore Our Future, Inc. ("ROF") and you, in your official capacity as treasurer, of a complaint alleging that ROF violated the Federal Election Campaign Act of 1971, as amended (the "Act") and provided you with a copy of the complaint.

After reviewing the allegations contained in the complaint, ROF's Response, and publicly available information, the Commission on July 16, 2015 found reason to believe that ROF and you, in your official capacity as treasurer, violated 52 U.S.C. §§ 30116(a) and 30104(b). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B), (12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "Dan M. Ravel". The signature is fluid and cursive, with a large, stylized "M" and a long, sweeping underline.

Chair

Enclosures

Factual and Legal Analysis

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3 **FEDERAL ELECTION COMMISSION**

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5 **FACTUAL AND LEGAL ANALYSIS**

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7 **RESPONDENT:** Restore Our Future, Inc. and **MUR 6535**
8 Charles R. Spies in his official capacity as Treasurer
9

10 **I. INTRODUCTION**

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12 The Complaint in this matter alleges that Restore Our Future, Inc. ("ROF"), an
13 independent expenditure-only political committee,¹ made a prohibited in-kind contribution to
14 Mitt Romney and his principal campaign committee, Romney for President, Inc. ("Romney for
15 President"), in 2012 by financing the republication of a television advertisement prepared by
16 Romney, his campaign committees, or authorized agents. ROF denies the allegation, asserting
17 that, because the advertisement at issue was prepared by Romney and his campaign during his
18 2008 candidacy, the advertisement cannot be considered "campaign materials prepared by the
19 candidate" for purposes of his 2012 candidacy. ROF Resp. at 4 (Apr. 17, 2012) (citing 11 C.F.R.
20 § 109.23(a)).

21 As set forth below, the Commission finds reason to believe that ROF violated 52 U.S.C.
22 §§ 30116(a) and 30104(b) (formerly 2 U.S.C. §§ 441a(a), and 434(b)) by making excessive and
23 prohibited in-kind contributions to Romney for President and failing to report those contributions
24 when it republished Romney for President's campaign materials.

¹ ROF has not established a separate account for contributions subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended (the "Act"). See Stipulated Order and Consent Judgment in *Carey v. FEC*, No. 11-259-RMC (Aug. 19, 2011); see also FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

II. FACTUAL BACKGROUND

Mitt Romney was a candidate for President of the United States in 2008 and designated Romney for President as his principal campaign committee. Statement of Candidacy for Mitt Romney (Feb. 13, 2007). Romney for President registered with the Commission on February 13, 2007. Statement of Organization (Feb. 13, 2007). Romney was unsuccessful in his 2008 presidential bid and withdrew from the race in February 2008. See ROF Resp. at 3.

On April 11, 2011, Romney filed a statement of candidacy to run for President in 2012, designating his campaign committee formed in 2007 — Romney for President — as his “principal committee” and renaming it “Romney for President Exploratory Committee.” See Letter from Mitt Romney to FEC (Apr. 11, 2011). On June 2, 2011, following Romney’s formal public announcement that he would seek the office of President, the Committee again changed its name — reverting back to “Romney for President.” Amended Statement of Organization (Jun. 2, 2011).

The Complaint references an article in *Politico* reporting on an ROF ad called “Saved,” which highlighted Romney’s efforts in 1996 to help track down the daughter of a Bain Capital colleague, Robert Gay. Complaint at 2-3. Gay narrates the 30-second video as follows:

My fourteen year old daughter had disappeared in New York City for three days. No one could find her. My business partner stepped forward to take charge. He closed the company and brought almost all our employees to New York. He said “I don’t care how long it takes, we’re going to find her.” He set up a command center and searched through the night. The man who helped save my daughter was Mitt Romney. Mitt’s done a lot of things that people say are nearly impossible. But, for me, the most important thing he’s ever done is to help save my daughter.

Emily Schultheis, *Pro-Romney Super PAC Runs Footage From Romney '07 Ad*,

POLITICO, Feb. 23, 2012. A female voice at end of the ad says “Restore Our Future is

1 responsible for the content of this message,” along with the text “PAID FOR BY
2 RESTORE OUR FUTURE, INC., WHICH IS RESPONSIBLE FOR THE CONTENT
3 OF THIS MESSAGE. NOT AUTHORIZED BY ANY CANDIDATE OR
4 CANDIDATE’S COMMITTEE. WWW.RESTOREOURFUTURE.COM.” Compl. at 3;
5 Schultheis, *supra*. According to the *Politico* article cited by the Complaint, the “Saved”
6 ad aired in February 2012, in advance of the Arizona and Michigan primaries that both
7 occurred on February 28, 2012. *See* Compl. at 2.

8 The Complaint alleges that the “Saved” ad “appear[s] identical” to an ad run in 2007 by
9 the Romney campaign called, “The Search,” except for the “final frame” containing the
10 disclaimers.² Compl. at 3. “The Search” ad was reportedly aired by the Romney campaign in
11 2007. Compl. at 2, citing Schultheis, *supra*. “The Search” ad concludes with Romney stating,
12 “I’m Mitt Romney and I approved this message,” along with the text “PAID FOR BY ROMNEY
13 FOR PRESIDENT, INC. APPROVED BY MITT ROMNEY.” Compl. at 3; Schultheis, *supra*.

14 ROF does not dispute that Romney’s 2008 campaign prepared the video footage used in
15 the “Saved” ad. ROF asserts, however, that “Mitt Romney, as a candidate for President in 2012,
16 or agents of this candidate and/or his current campaign, had nothing to do with the preparation of
17 ROF’s current television advertisement ‘Saved.’” ROF Resp. at 3. Based upon the regulatory
18 definition of “candidate,” *see* 11 C.F.R. § 100.3(b), ROF contends that Mitt Romney as a
19 “candidate” for President in 2008 is an “entirely different entity” than Mitt Romney as a
20 “candidate” for President in 2012. ROF Resp. at 4. Therefore, ROF argues that because
21 “The Search” was “not prepared by Romney, as a current [2012] candidate for President, or his

² In comparing the advertisements, there are two other immaterial differences. First, video of the skyline over New York City during the first few seconds of each ad has been slightly altered; it appears to have been shot from different vantage points. Second, the two ads very briefly display different shots of Romney at approximately the 22-second mark as well as during the last few seconds.

1 authorized committee, or his agents," there has been no republication of any footage or campaign
2 materials prepared by a current "candidate" or campaign for federal office, and therefore no
3 violation of the Act or regulations. *Id.*

4 ROF further asserts that it purchased a license to "use the archival footage" in its "Saved"
5 ad from the "owner," Cold Harbor Films, and that there was no coordination or contact with the
6 Romney campaign. *Id.* at 5. ROF states that the purchase was "an arms-length transaction" and
7 that Cold Harbor Films is not a vendor for Romney's current campaign and thus not an "agent"
8 of the campaign. *Id.*³

9 III. LEGAL ANALYSIS

10 Under the Act, "the financing by any person of the dissemination, distribution, or
11 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
12 campaign materials prepared by the candidate, his campaign committees, or their authorized
13 agents shall be considered an expenditure." 52 U.S.C. §30116(a)(7)(B)(iii). Commission
14 regulations further provide that the republication of campaign materials "prepared by the
15 candidate, the candidate's authorized committee, or an agent of the foregoing" is considered a
16 contribution for purposes of contribution limitations and reporting responsibilities of the person
17 making the expenditure. 11 C.F.R. § 109.23(a). Under Commission regulations, however, the
18 candidate who prepared the materials is not considered to have received an in-kind contribution
19 and is not required to report an expenditure, unless the republication is a coordinated
20 communication under 11 C.F.R. §§ 109.21 or 109.37. *Id.* § 109.23(a).

³ ROF's disclosure reports filed to date do not appear to show any disbursements to Cold Harbor Films in
ROF's disclosure reports filed to date. Romney for President disclosed a \$2,515 payment to Cold Harbor Films,
however, dated January 18, 2008, for "media."

1 ROF argues that "Saved" "was not prepared by Romney as a current candidate" but
2 instead "was prepared and produced by Mitt Romney's prior candidacy and campaign in 2007."
3 ROF Resp. at 4. In support of its interpretation, ROF points to 11 C.F.R. § 100.3, which states
4 that the date on which an "individual" becomes a "candidate" is a function of when the
5 candidate's contributions or expenditures aggregate to \$5,000. ROF argues "Mitt Romney as a
6 'candidate' in 2008 is an entirely different entity from Mitt Romney as a 'candidate' in 2012."
7 And as such, ROF's 2011 production of the 2008 campaign "Saved" advertisement did not
8 violate the Commission's republication provisions, because there was no republication of
9 "current" (2012) campaign materials. ROF Resp. at 4.

10 The Commission has not previously considered whether the phrase "campaign materials
11 prepared by the candidate [or] his campaign committees" is limited to campaign materials
12 prepared during the same election cycle in which a third party republishes the materials.⁴ The
13 statutory and regulatory republication provisions do not state whether there is any temporal
14 limitation. And there is no guidance in the Commission's explanation and justification of the
15 Commission republication regulation that would indicate whether or not a third party could use a
16 candidate's ad from a previous cycle, regardless of how far back in time a candidate may have

⁴ There is one enforcement matter, MUR 5672 (Save American Jobs Association), that involved the use of "campaign materials" distributed by a third party that were produced in a prior election cycle; however, there was no substantive discussion of the timing issue in any Commission-approved documents. The Complaint in MUR 5672 alleged, among other things, that Save American Jobs Association ("Association"), a 501(c)(4) corporation, republished campaign materials by hosting on its website a campaign video during Jack Davis's 2006 congressional campaign; the video had been produced by the Davis campaign during his 2004 candidacy for the same office. The Office of General Counsel recommended that the Commission find reason to believe that the hosting of the video constituted a republication of campaign materials, but to take no further action and admonish the Association in light of the likely *de minimis* costs involved. The Commission dismissed the allegation "in the proper ordering of its priorities" without further explanation, citing *Heckler v. Chaney*, 470 U.S. 821 (1985). See Statement of Reasons, Comm'rs Lenhard, Mason, von Spakovsky, and Weintraub, MUR 5672 (May 31, 2007). The Commission did not admonish the Association or make any finding or statement that could be construed either as accepting or disputing OGC's republication analysis.

⁵ *Explanation and Justification on Coordinated and Independent Expenditures*, 68 Fed. Reg. 441 – 443 (Jan. 3, 2003).

1 run for office.⁵

2 The statute states that republication "... of campaign materials prepared by the candidate,
3 his campaign committees, or their authorized agents" shall be considered a contribution. 52 USC
4 30116(a)(7)(b)(iii); *see also* 11 C.F.R. § 109.23(a). Romney's 2008 campaign committee
5 prepared the 2007 "Search" advertisement from which the video footage was used in ROF's
6 2012 "Saved" advertisement. Despite the fact that Romney was a candidate in two separate
7 campaigns – 2008 and 2012 – the "Saved" advertisement uses the materially identical video
8 footage that was prepared by Romney's 2008 campaign committee with the same message.
9 Because the Act defines republication to include materials prepared by the candidate's
10 "campaign committees," in the plural form and there is nothing in the statute or Commission
11 regulations or precedent that limits republication to within the same election cycle, we conclude
12 that ROF republished campaign materials originally prepared by one of Romney's campaign
13 committees.⁶ The Commission therefore finds reason to believe that ROF violated 52 U.S.C.
14 §§ 30116(a) and 30104(b) (formerly 2 U.S.C. §§ 441a(a), and 434(b)) by making prohibited and
15 excessive in-kind contributions to the Committee when it republished Romney for President's

⁵ *Explanation and Justification on Coordinated and Independent Expenditures*, 68 Fed. Reg. 441 – 443 (Jan. 3, 2003).

⁶ The ROF ad "Saved" replicates the Romney campaign ad "The Search" with only minor variations (*e.g.*, the disclaimer at the end of each ad), which distinguishes this matter from previous republication matters in which there were substantive differences between the "campaign materials" and the third-party communications. *See, e.g.*, MUR 6502 (Nebraska Democratic Party) (no republication where state party ads used common political phrase previously used in a "tweet" posted by candidate's campaign but contained significant additional language that differed from the campaign materials); MUR 6037 (Merkley) (no republication where state party ads featured candidate and contained issues and messages similar to candidate's press releases but also included different language and phrases). MUR 5743 (Betty Sutton for Congress/Emily's List) (Commission dismissed, with an admonishment, a complaint involving the alleged republication of campaign photographs in third-party mailers). *See also* MUR 5743, Statement of Reasons of Comm'rs Weintraub and von Spakovsky; MUR 5996 (Tim Bee, *et al.*) (Commission was unable to agree as to republication, but exercised prosecutorial discretion to dismiss the matter; MUR 5996, Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter and McGahn. Commissioners have also found that republication does not occur when the campaign materials are not materially the same. *See, e.g.*, MURs 6617 (Vilsack) and 6667 (Bustos) Statement of Reasons of Comm'rs Hunter and Petersen; MURs 6357 (American Crossroads), MUR 5879 (Harry Mitchell/Democratic Senatorial Campaign Committee) Statements of Reasons of Chair Hunter and Comm'rs McGahn and Petersen.

1 campaign materials, and by failing to disclose the expenditures as contributions to the
2 Committee.

3 This is a case of first impression, and ROF's reading of the regulation concerning the
4 scope of the definition of "candidate" was not unreasonable. Therefore, given the unique
5 circumstances presented here, the Commission exercises its discretion not to open an
6 investigation and instead will seek to engage in pre-probable cause conciliation with
7 Respondents.